

not more than ten years nor less than two years upon any person not having a license or who shall sell or furnish opium, etc., to any person or persons contrary to law, and if therefore follows that this penalty may be inflicted upon any person licensed or authorized to sell or furnish opium, whether under this law or any of those previously mentioned, who shall not comply in all respects with, or sell contrary to the terms of those laws.

Section 4 of the Act in question prescribes the same penalty for any person who shall have possession of any opium contrary to the provisions of Section 3, but as that Section does not impose any duty upon the purchaser the decision arrived at in the case of *Manuel Brito* must be followed, and it must be declared that no punishment for the mere possession of opium can be inflicted under that Section.

We have now to consider whether having opium in possession, is an offense under the law as amended by the Act No. XVIII of 1880.

This is the only law which makes the possession of opium an offense, and the possession necessary for a conviction must be contrary to the terms of Section 3 of that Act, herein before set out.

Now does the Act of 1886 conflict with this Section?

In construing this Act we must take into consideration the intention of the Legislature so far as such intention can be gathered from the text of the Act itself, and must give effect to the Act if possible.

The Legislature has attempted to deal with, and prescribe a punishment for persons, having opium in their possession, but as we have already stated, have not done so effectively. It may be the effect of previous legislation was not in the minds of the legislative body, but we cannot assume this. On the contrary we must assume that it was conversant with the whole law upon which they were legislating, and it appears to us that they intended to remove some of the restrictions affecting the dealing with the drug in question, and to that extent the law would seem to be effectual, for it undoubtedly enables persons prohibited by former laws, to sell this drug.

By attempting to prescribe a penalty for having possession of opium, under certain circumstances the Legislature has shown its intention to deal with the subject, and it has failed in its attempt.

We can only give effect to such intention, by adding after "Section 2 of this Act" in Section 3 of the law of 1874 the words "from a person duly licensed as aforesaid" or some similar words, but which would materially alter the offense described, and would in fact be legislating instead of construing.

The part of the Act of 1874 dealing with the matter of the possession of opium is in conflict with that part of the Act of 1886 which refers to the same subject and is to this extent repealed, as Section 11 of the Act of 1886 repeals that part of the Act of 1874 which is in conflict with the provisions of this Act, and the same are hereby repealed.

Under these circumstances we have, and we do so with much regret, to say that the mere possession of opium is not an offense punishable by any law now in force.

However, whether a person having opium in possession could not properly be charged and convicted of smuggling the same, is another question, and one that the Court will have to consider when it is raised.

The first point made on this appeal is that "the Crown has not proved its charge of unlawful possession of opium."

On the authority of *Briggs vs. Briggs*, 4 Haw. 448, we hold that whether there is any evidence to sustain the judgment, is a question of law, but the Court in such case will examine the evidence only so far as to ascertain whether or not there is evidence to sustain the judgment. We are not to consider the question whether the charge of unlawful possession of opium was fully proved, as the appeal is limited to the points of law taken. Finding from papers sent up, evidence that the defendant had possession of opium, we enquire no further and overrule this point.

The second point has already been considered fully.

The third point, that the Act of 1886, entitled "An Act to regulate the importation and sale of opium" is unconstitutional and therefore void and of no effect, remains to be considered.

The 7th Article of the Constitution is cited as being contravened by this law. It reads: "To avoid improper influences which may result from intermingling in one and the same Act, such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in its title."

It is contended by the defendant's counsel that as the title of the Act in question is "An Act to regulate the importation and sale of opium," and the Act itself legislates upon not only the importation and sale of opium, but of "preparations of opium," the Act embraces more than one object, and also that the subject of preparations of opium is not expressed in the title, and therefore the Act is unconstitutional and void.

It becomes necessary to enlarge somewhat upon the duty of the Court where questions involving the constitutionality of a law are presented.

Judge Cooley says, on page 150 of his work on Constitutional Limitations, "It must be evident to any one that the power to declare a legislative enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."

"The Legislative and Judicial are co-ordinate departments of the Government of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of the power which, by the Constitution, is not conferred upon it. The Constitution apportions the powers of government, but it does not make any one of the three departments subordinate to another, when exercising the trust committed to it. The Courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it."

"But the Courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only when they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action."

The power to declare a law unconstitutional is expressly given to the Supreme Court by Section 824 of the Civil Code.

Article 78 of the Constitution prescribes that all laws heretofore enacted or that may hereafter be enacted, which are contrary to this Constitution shall be null and void.

Article 69 of the Constitution prescribes that the decisions of the Supreme Court when made by a majority of the Justices thereof, shall be final and conclusive upon all parties.

But, considering the solemn and responsible nature of the function thus devolved upon the Supreme Court, we adopt the principle which prevails in other Courts, that the Court will not pass upon a constitutional question and declare a statute to be invalid unless a decision upon that very point becomes necessary to the determination of the cause.

"In any case where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the Court may rest its judgment, and thereby render the constitutional question immaterial to the case, the Court will take that course and leave the question of constitutional power to be passed upon when a case arises which cannot be otherwise disposed of and which consequently renders a decision upon such question necessary."

Cooley Const. Lim. p. 163.
Frees vs. Ford, 6 N. Y. 177.
White vs. Scott, 4 Barb., 56.

The Court having on the second point of the appeal found that the defendant in this case cannot be punished by any law now in force for the offense of which he is charged—to wit, the possession of opium—the question whether this law is in conflict with the Constitution becomes immaterial. And it is not proper for us to listen to an objection to the constitutionality of an Act by a party whose rights it does not affect. See Cooley, p. 163.

The defendant is charged with a specific offense under a law which we have held inoperative against him. He cannot upon this appeal raise the unconstitutionality of the law in favor of persons not before this Court.

To illustrate it further. The Court would only be authorized to consider the unconstitutionality of the Act of 1886, on the ground of its title not including "preparations of opium" when the objection is made by one who is charged with the offense of having unlawful possession of "preparations of opium."

This principle was adopted by this Court in the case of *The King vs. Yat Sing*, 3 Haw., 672, and we follow it. Whenever a person charged with importing or selling opium contrary to the Act, or for violating the regulations said to have been made thereunder, or for importing or selling preparations of opium, shall raise the question of the constitutionality of the Act and the decision of this question is necessary, as being the very issue, this Court will consider it and will not be at liberty to decline so to do.

The result is that the judgment of the lower Court must be reversed and the defendant discharged.
F. M. HATCH and P. NEUMANN for the Crown. J. T. DARE for defendant.
Honolulu, April 25, 1887.

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1—Authorized Capital.....\$3,000,000
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The undersigned, General Agents of the above three Companies for the Hawaiian Islands, are prepared to insure Buildings, Furniture, Merchandise and Produce, Machinery, etc., also Sugar and Rice Mills, and vessels in the harbor, against loss or damage by fire on the most favorable terms.
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Of 1,041 death claims, amounting to \$3,541,892, paid in 1885.

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731 were paid within 5 days after receipt; amount, \$2,637,285.

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